Supreme Court, U.S.
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Case Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1995 Term

CHARLES J. GREENE v. CITY OF MONTGOMERY,

Petitioner Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

CHARLES J. GREENE, Petitioner
1274 Adell Street
Prattville, Alabama 36066
Phone: (334) 365-5197

39 pp

QUESTIONS PRESENTED

Question (1)

Whether the state court proceedings to settle the record upon which petitioner's appeal from his conviction was heard by the state appellate court, in which settlement proceedings the presiding judge had a direct pecuniary interest in deciding against petitioner, resulted in denying petitioner due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

Question (2)

Whether the improper conduct of prosecution witnesses, in exposing jurors to case-related information during a trial recess outside of the courtroom, where the prosecution presented no valid evidence to rebut the prejudice to petitioner arising therefrom, resulted in denying petitioner his due process right, to an impartial jury, within the meaning of the Fourteenth Amendment to the United States Constitution.

Question (3)

Whether the state court proceedings to settle the record, upon which petitioner's appeal from his conviction was heard by the state appellate court, in which settlement proceedings the petitioner was not allowed to present critical evidence, resulted in denying petitioner due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

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CITATION OF OFFICIAL REPORTS

Because the state case was only recently decided, the opinions and orders of the state appellate and supreme courts have not yet been reported, but they are set out in full in the accompanying appendix, documents A, B, C, D, E, and F.

Citations for the federal case arising out of the state appeal are as follows: the Final District Court dismissal order is not reported, but a copy of it is contained in the appendix, document N; the affirmance by the Eleventh Circuit Court of Appeals is reported at 22 F. 3d 1099 (11th Cir. 1994) and its order on rehearing is reported at 29 F. 3d 643 (11th Cir. 1994); the United States Supreme Court's denial of certiorari is reported at 115 S. Ct. 676 (1994), and its denial of rehearing is reported at 115 S. Ct. 1184 (1995).

The Alabama Court of Criminal Appeals entered the opinion and judgment now under review on September 8, 1995 (Appendix, A), affirming the petitioner's conviction; that court denied rehearing (App., B) on November 9, 1995. On April 19, 1996, the Alabama Supreme Court quashed the previously granted write of certiorari (App., E, F) and denied discretionary review.

The final judgment rendered by the Alabama Court of Criminal Appeals in this case denied the petitioner relief from the violation of a his rights under the Due Process Clause of the Fourteenth Amendment to the United States Supreme Court, to review the state appellate court judgment by writ of certiorari, by the provisions of 28 U.S.C. 1257 (a) (1994).

CONSTITUTIONAL PROVISION

U.S.C.A. Const. Amend. 14, 1:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Note 1: The petitioner suggests that this Court skip to the Argument section of this petition in order to familiarize itself with the basic legal arguments involved. This will better enable the Court to quickly pick out the most critical facts involved in this case without getting lost in the following laborious chronicle of

the petitioner's five-year struggle to properly settle the appellate record in this case.

Note 2: Since the record in this case was developed piecemeal over a five-year period, it consists of several relatively small volumes; the titles on the covers of these volumes might be a bit misleading. To avoid confusion, the petitioner submits the following descriptions of each volume and notes the manner in which each will be designated in the record references in this petition:

(1) the volume containing the trial transcript and clerk's record will be designated as (Rec., pp. 1-155);

(2) the volume containing the new trial motion hearing transcript will be designated as (N.T. Hrg., pp. R1-R48);

(3) the volume entitled "Second Supplement Record," an additional clerk's record, will be designated as (2d. S.R., pp. 1-164);

(4) the two separate volumes described below, both entitled "Supplemental Record," will be designated as follows:

(a) one of these volumes, a transcript of the original record correction hearing (11-6-91), reported by Julia Crotty, will be designated as (S.R., Crotty Rpt., pp. R1-R24);

(b) the other "Supplemental Record," a clerk's record containing the recusal motion under review here, relates to a later record correction hearing (1-20-93) described in (5) below- to avoid confusion, the petitioner will forego making reference to this volume, and will instead designate the recusal motion, copied herein, as (Appendix, O).

(5) a volume entitled "Ex parte Hearing Proceedings", a transcript of the later record correction hearing (1-20-93) held after remand, reported by Dub Harris, will be designated as (Hrg. Proc., Harris Rpt., pp. 1-52) - this is the hearing to which the recusal motion (App., O), relates.

Introduction

On a mild and sunny day, April 4, 1990, at approximately noon, the petitioner, Charles J. Greene, walked into an Autozone auto parts store. Greene was there for a conference with Dan Gomez, Greene's former regional manager. This appointment had, a day earlier, been set up by Paul D. Smith (Rec., pp. 21-22, 58), Greene's former district manager (Gomez was Smith's immediate supervisor).

Dressed in coat and tie, Charles Greene walked up to the parts counter, where he was greeted by James Wordlaw, assistant store manager. Wordlaw and Greene spent a few moments in idle conversation, after which Wordlaw explained that Gomez would soon arrive for the scheduled conference. Wordlaw then offered to attempt to contact Gomez by telephone, and then left for the backroom office, requesting that Greene wait for Gomez there at the parts counter (Rec., pp. 34-35, 38-40, 58-59).

Charles Greene then struck up a conversation with Bob Barnes, his former co-employee, to pass the time while he awaited the arrival of Gomez. Business was slow, allowing Greene and Barnes to talk uninterrupted until about fifteen minutes later, when a police officer walked into the store (Rec., p. 59).

They approached Greene and Barnes, and asked whether Charles Greene was at the store. Believing that the officer wished to see him in order to get a discount (it had been Greene's habit to give uniformed officers a ten percent discount), Greene began to explain that he could not give the discount because he no longer worked there. As Greene was explaining this to him, the officer ordered Greene to assume the position and then frisked him (Rec., p. 59); of course, no weapons were found. Needless to say, Greene was absolutely shocked by the stop-and-frisk. As he was being handcuffed, Greene, in disbelief, asked the officer what was going on.

Wordlaw then reappeared from the backroom as the officer was explaining that he had been dispatched there following a telephone call to headquarters made by James Wordlaw, to the effect that Greene was trespassing (Rec., pp. 47-48). Greene, by now more puzzled than shocked, explained that Wordlaw had given no indication that Greene was unwelcome, and had in fact specifically asked him to stay there and wait for Gomez (Rec., pp. 39-40, pp. 58-59).

After further explaining that he was there at the invitation of Smith to talk with Gomez, Greene pointedly asked Wordlaw to confirm that he had asked Greene to stay in the store and wait for Gomez. Wordlaw did confirm this and then explained that he was only following orders (Rec., pp. 38-39) from his superiors, and that now he wanted Greene arrested.

Charles Greene was then taken to police headquarters and booked on a charge of trespassing. And so, over six years ago,

this case began.

Background

A short narrative, of earlier events which form the subject matter of the intended Gomez conference, is necessary in order to explain the events of April 4, 1990, which taken alone defy explanation. Reference to these earlier events also sheds light on the motivating forces which led Smith and Wordlaw to undertake such underhanded tactics to secure Greene's arrest.

During late 1989, Greene was employed at the Autozone store in Selma, which had been newly constructed and was being set up for the initial opening for business. During this period Smith (then a district manager over several stores) made frequent visits to the store. Perhaps because of the relaxed atmosphere of an unopened store, Smith adopted a very informal demeanor when visiting (for example, on one occasion Smith walked into the store, in a euphoric state, humming "toot, sweet, toot, sweet", this continuing for several minutes until an embarrassed Greene finally got him to stop by inquiring as to the proper gondol set up.). On another occasion Smith was asked about the number of employees to be hired and he stated, "if I can help it, no n---ers will be working here." Both Greene and store manager Keever immediately objected to this, and asked Smith to be more cautious about making such statements publicly. A few weeks later, after the store was opened, Greene was transferred to the Montgomery store; a few months later, Keever was terminated. A short while after the trial, Paul Smith was demoted from district manager over several stores down to assistant manager of a Birmingham store.

While working at the Montgomery store Greene received information that some of the store management staff were involved in some incidents of theft, as well as frequent on-the-job cocaine abuse; at the time of trial, Autozone security people were investigating store manager Scott Patrick (Rec., p. 60). Scott Patrick's employment with Autozone has since been terminated.

A few weeks prior to Greene's discharge, another incident occurred at Autozone which, Greene felt, warranted a conference with Gomez. One day in late November 1989, Perry Barbour was allegedly caught shoplifting (Rec., p. 55) on the store, just prior to Greene's arrival there for his scheduled shift,

and was detained by employee Mo Taylor and locked in the rest room.

When Greene arrived, the assistant manager then on duty asked him to go down to the police station to swear out a warrant on Barbour. Greene stated that the assistant manager should go because he had actually seen the incident. The assistant manager then explained that he had been arrested for cocaine possession a couple of years prior to that, and was extremely nervous about re-visiting police headquarters. So Greene agreed to go downtown after the police arrived, ultimately spending more than four hours there, for which he was not paid.

After the police arrived, they questioned Barbour for several minutes, with no response from Barbour. The officers apparently became angry at Barbour's failure to answer them, because they then began to beat Barbour mercilessly, slaping him about the face and head and slamming the back of Barbour's head against the wall several times; one of the officers also made racial slurs against Barbour while the beating was taking place. Greene indicated, when asked by another Assistant Manager that he would be willing, as with any other matter to testify truthfully as to these events if asked in court.

Just before he was terminated, Greene was sent a letter by Randall Thomas, the judge presiding over Barbour's case, requesting his attendance at a hearing. (Rec., p. 55) Greene later was informed about the letter and attempted to get a copy of it from his employee file (Rec., p. 55), but was told by another employee that it could not be found. Greene was unable to attend the hearing because of the delay in securing this letter, and Greene's repeated attempts to secure the letter from Autozone staff were to no avail.

These events compelled Greene to seek the conference with Gomez. Greene had spoken with employees of several stores about these events just prior to the time he was fired. Greene wanted to inform Gomez about Smith's racial comments and his strange behavior at the Selma store, about employee theft and drug abuse at the Montgomery store, and about the unpaid time he spent on the Barbour case as well as the refusal to forward the Randall Thomas letter to him. But, above all else, Greene wanted to inquire as to whether his comments to other employees about these events lead to his termination.

Municipal Court

After Charles Greene was arrested on April 4, 1990, he was taken down to police headquarters, processed, and made to give a cash appearance bond; Greene's trial was set for May 10, 1990 in the Municipal Court.

The trial was held on May 10, 1990. James Wordlaw, duly subpoenaed by Greene, did not appear, and Greene moved for a continuance to secure his attendance. The Municipal Court refused this request, and defendant was convicted. Greene appealed the case for trial de novo in Circuit Court (jury trial). (Rec., p. 90).

Circuit Court

The trial in Circuit Court, case number CC-90-5109, was originally scheduled for August 3, 1990. Charles Greene appeared in the courtroom and awaited trial. After about one hour, the judge's secretary informed Greene that the trial had been continued as per the prosecution's motion to continue (Rec., p. 98), which had been granted by the judge earlier that morning. This motion was presented to the judge in chambers and was granted without notice to Greene (the motion was not filed in the clerk's office until August 6, 1990) (Rec., p. 90).

The grounds for the motion were that Paul Smith was out of town and that Scott Patrick was bedridden. It was later shown by Greene (N.T. Hrg., p. R8), (Rec., pp. 129-130), that Smith was in fact in Montgomery (at the Fairview Street Autozone Store) at the time of trial, and that Scott Patrick had come to work on both the day prior to, and the day after, trial. At the new trial hearing, the trial judge refused to allow Greene to question the prosecution, Patricia Kelley, as to whether she had made a telephone call to Paul Smith at the Montgomery Fairview Street store on that day (N.T. Hrg., p. R6); the trial judge refused to allow the question because, he said, it did not have "anything to do with these two witnesses." See the Alabama Court of Criminal Appeals Opinion, page 5 (App., A), which discusses this matter.

The trial was reset to August 27, 1990. Unknown to Greene until several months later, a defense witness, Mo Taylor, was told by a member of the Autozone management staff that his job would be jeopardized unless he testified favorably to Autozone at the rescheduled trial. (Rec., p. 130). This occurred sometime

between August 3, 1990 and August 27, 1990. (Rec., p. 130). See also (N.T. Mrg., pp. R20-R21).

The trial was later rescheduled to February 28, 1991, and James Wordlaw again failed to appear; a bench warrant issued and Wordlaw was arrested and jailed for several hours (Rec., pp. 37, 40-42). The trial was reset to March 1, 1991.

Trial

On March 1, 1991, Wordlaw did appear for trial, and was seated on a bench just outside the courtroom when Greene arrived. Wordlaw, angry at being arrested, saw Greene and shouted "fresh meat, fresh meat" (Rec., p. 128), (N.T. Hrg., pp. R35-R36).

The trial began and witnesses, including Patrick, Wordlaw, and Taylor, were standing in the hallway when a recess was called. As the jurors exited the courtroom they passed by Patrick and Wordlaw, who were discussing Wordlaw's arrest and his previously given testimony (Rec., p. 130). Both Patrick (N.T. Hrg., R25) and Wordlaw (N.T. Hrg., p. R33) admitted to discussing these matters outside the courtroom.

The trial resumed and the defendant was ultimately convicted. On April 1, 1991, Greene filed a motion for new trial (Rec., pp. 117-125). The motion alleged, among other things, that his right to a fair trial was violated by the prosecution's false motion to continue which delayed the trial past a point where the probability of prejudice to defendant (the threat made to witness Taylor concerning his testimony) arose (Rec., p. 119, item 3). Greene also alleged that he was denied an impartial jury, and the right to confront adverse witnesses, by the exposure of the jurors to Patrick and Wordlaw's discussion, described above (Rec., p. 121, items 6,7).

New Trial Hearing

A hearing was held on the new trial motion on Monday, April 29, 1991. Prior to the hearing, on Friday, April 26, 1991, the prosecutor filed a response to the motion for new trial, including affidavits, which Greene did not receive in the mail until after the hearing.

The affidavits all relate to February 28, 1991 (the trial was held March 1, 1991), are presented in the form of conjunctive

denials, and are directly contrary to the in-court statements of the affiants Patrick and Wordlaw; a mileage log (Rec., p. 150), which had obviously been altered regarding the location of affiant Smith on 8-3-90 ("140" - Fairview Street, was changed to "446" - Selma), was also attached to the response (see Rec., pp. 136-152).

Regarding this response, Greene objected at the hearing to its submission on the grounds that he had not seen it and moved that he be given time to review it, which request was refused. None of this objection appeared in the transcript (see Rec., pp. 101-102).

Next, Greene attempted to question prosecutor Kelly (N.T. Hrg., p. R6) concerning a telephone call she made to Smith on August 3, 1990, the original trial date, when Smith was falsely alleged to be out of town; the trial judge refused to allow the question (N.T. Hrg., p. R6).

Greene then questioned Patrick and Wordlaw concerning the hallway discussion they entered into in the presence of jurors (N.T. Hrg., pp. R25, R33). It should be noted that, during the questioning of Wordlaw, Greene was detained by the bailiff, taken outside of the courtroom, and frisked (of course, no weapon was found); Greene has no knowledge as to events transpiring inside the courtroom during his detention, and the matter does not appear in the transcript (see Rec., p. 103, item 7).

After questioning the witnesses, Greene was asked by the court if he wanted the hearing continued to thirty days later, and both Greene and Kelly indicated no objection (see Appendix, I, item 6, pages 4 and 5); this exchange was distorted in the transcript so that it appears as though the judge continued the time for ruling on the motion (N.T. Hrg., pp. R46-R47), rather than continuing the hearing itself (App., I, item 6).

Later, after preparation of the transcripts, defendant moved for correction of the above-mentioned omissions and distortions of the transcripts (2d S.R., pp. 28-36) (App., I).

On May 28, 1991, without allowing a further hearing, the trial judge overruled Greene's motion for new trial (Rec., p. 153). Greene then filed Notice of Appeal from his conviction, and from the overruling of the new trial motion, on July 7, 1991 (Rec., p. 154).

The original Record on Appeal in this case was filed on August 27, 1991, with the Court of Criminal Appeals (case

number 90-1464).

The Appeal

1. 9-24-91 - Defendant filed original brief in the appellate court, and also filed, in both trial and appellate courts, his initial record correction motion (2d. S.R., p. 9).
2. 9-26-91 - The appellate court orders that the defendant file his correction motion in the trial court (Docket Sheet, Appendix, H).
3. 10-8-91 - Defendant refiled correction motion in trial court (2d. S.R., pp. 28 et seq.) and also filed a motion to compel discovery of audio tape recording of new trial hearing (2d. S.R., pp. 25-27), specifically requesting an opportunity to review tape in preparation for presentation of same as evidence at the record correction hearing.
4. 11-6-91 - Record correction hearing held (S.R., Crotty Rpt., pp. R1-R-24); trial judge grants record correction motion (S.R., Crotty Rpt., p. R16) and orders that defendant be allowed to review said audio before it is sent to appellate court (S.R., Crotty Rpt., R17).

NOTE: IN VIEW OF THE FACT THAT THE CORRECTION MOTION WAS GRANTED AND REVIEW OF TAPE ORDERED, NO EVIDENCE WAS PRESENTED AT THIS HEARING.

5. 12-31-91 - Defendant files motion in trial court for imposition of contempt on court reporter Lambert for failing to allow him to review tape (2d S.R., p. 81); defendant files appellate court motion to remand for record correction (Dkt. Sht. App., H).
6. 1-23-91 - appellate court remands for record correction and states that audio tape itself cannot be used as a record (Dkt. Sht., App.H)
7. 1-24-92 - Defendant filed renewed record correction motion and requested hearing on same (2d S.R., pp. 98, 100) (App., I, J); in both motions, defendant indicates intention to present tape as evidence (as per appellate court order disallowing use of tape itself as record).

At this juncture, audio tape had still not been sent to appellate court, nor had the Crotty transcript been transmitted.

NOTE: THIS RENEWED MOTION WAS NOT BROUGHT UP FOR HEARING UNTIL 1-20-93.

8. 2-4-92 - Trial court order stating that record complete (2d. S.R., p. 144).

NOTE: THIS ORDER WAS ENTERED WITHOUT AFFORDING DEFENDANT AN EVIDENTIARY HEARING.

9. 2-11-92 - Defendant files motion to vacate 2-4-92 trial court order, claiming denial of due process right to a hearing on record correction motion (2d S.R., p. 139).
10. 2-14-92 - Appellate court denies motion to vacate (Dkt. Sht., Ap., H).
11. 2-25-92 - Defendant files motion to transmit Crotty report to appellate court; this report contains grant of record correction motion) (Dkt. Sht.).
12. 2-28-92 - Motion to transmit denied (Dkt. Sht.)
13. 2-28-92 - Defendant files supplemental brief (Dkt. Sht.) asserting violation of due process because of improper record.
14. 3-27-92 - Case submitted on briefs in appellate court (Dkt. Sht.); defendant raises issues of improper record correction procedure in violation of due process.
15. 6-26-92 - Appellate court reviewed incomplete and inaccurate record and affirms conviction (Dkt. Sht).
16. 7-10-92 - Defendant files application for rehearing in appellate court; again asserts improper, unconstitutional record denies due process.
17. In summary, at this point, although the record correction motion (App. I) had been granted (S.R., Crotty Rpt., p. R17), the record still had not been corrected pursuant to said grant. Further, the Crotty report, contsining the grant of the record correction motion, had still not been included in the appellate record; defendant's motion to transmit same had been denied (Dkt. Sht.). Also, the defendant had still not been allowed to review the audio tape, nor had be been allowed to present said tape or other evidence bearing on the inaccuracy of the then-current appellate record; defendant had requested a hearing, and an opportunity to review and present said audio tape as evidence (App., I, J) but neither of these requests were acted upon by the courts.

Because the defendant had been unable to secure a truthful record, and had exhausted his state court record correction remedies to no avail, he next initiated an action in the United States District Court against the state appellate judges, the state trial judge, and state court reporters Lambert and Murphree. The federal action sought injunctive relief against these state officials requiring them to allow defendant to present an

accurate record in his state appeal; additionally, the action sought damages against the state trial judge, in his individual capacity, for acts done by him, in clear absence of jurisdiction, to impede the presentation of an accurate record.

18. 8-20-92 - The above-described action was filed in federal district court (case number CV-92-A-1026-N) (M.D. Ala., N. Div.). All federal defendants were served, by personal service, the summons, complaint, and TRO motion on this date.

19. 8-20-92 - The TRO motion was presented to the federal District Court; the motion requested that the state appellate judges be restrained from entering further orders in the state appeal until such time as a hearing could be held on a motion for preliminary injunction. Greene justified this motion by stating that the state appellate judges, if not restrained, might enter orders in the state case designed to impair the federal courts' flexibility and authority to decide the case and grant appropriate relief.

The TRO motion was denied until such time as a hearing could be held on said motion; the hearing was set for 8-21-92. The perplexing aspect of this order is that the District Court withheld the TRO pending a hearing; the very purpose of a TRO is to prevent parties from acting to interfere with the case during the interim between notice and hearing - a TRO obviously cannot serve this purpose if it is withheld until the time of the hearing (App., K).

20. 8-21-92 - The state appellate judges enter their order (which the TRO motion sought to prevent) denying Greene's state Application for Rehearing, and then filed their Motion to Dismiss in federal court, asserting mootness, and making false claims regarding the timing of said order; the motion to dismiss contains the following false assertion:

> "7. Plaintiff's demand for injunctive relief against the various judges of the Alabama Court of Criminal Appeals is MOOT, for on August 20, 1992, the Alabama Court of Criminal Appeals, unaware of the filing of this action, denied plaintiff's application for rehearing....."

The TRO motion was then denied as moot by the District Court (App., L).

NOTE: THE PUBLISHED STATE COURT ORDER STATES THAT THE DENIAL OF REHEARING WAS ENTERED ON 8-21-92 (not on August 20, 1992, as is claimed in the above passage - see

the state appellate court docket sheet, Item H in the attached Appendix); RETURN OF SERVICE FORMS SHOW THAT THE STATE APPELLATE JUDGES WERE NOTIFIED OF THE FEDERAL SUIT ON 8-20-92, A DAY BEFORE THEY ENTERED THEIR REHEARING ORDER (therefore, they were well aware, at the time of entry of the order, of the filing of the federal suit).

21. 9-1-92 - Greene files motion for mandatory injunction to restore status quo (App., M) in order to remedy the evasive tactics of the state appellate judges; the District Court never ruled thereon.

22. 9-4-92 - The federal court had taken no action on Greene's pending status quo motion requesting suspension of the Court of Criminal Appeals rehearing order; since the appellate court order was still in effect, the jurisdictional time limit for filing a certiorari petition expired on this date, and Greene had no other choice than to file his petition in the state supreme court (case number 1911878), again asserting improper record settlement in violation of his due process rights. The District Court later based its decision to dismiss in part on the filing of the supreme court petition.

NOTE: THE FEDERAL ACTION WAS NOT FINALLY DISPOSED OF UNTIL 3-11-93.

23. 11-10-92 - The Alabama Supreme Court remanded the case to the Court of Appeals for further proceedings. (Dkt. Sht.)

24. 11-12-92 - The appellate court orders (2d S.R., p. 153) that the Crotty report be transmitted to the appellate court.

25. 11-16-92 - Crotty report transmitted to appellate court (Dkt. Sht.)

26. 12-8-92 - Defendant filed brief asserting that improper record, and denial of evidentiary hearing on record correction, violated his right to due process.

27. 12-15-92 - Appellate court orders that that audio tape be transmitted to appellate court.

28. 12-22-92 - Audio tape transmitted to appellate court. Shortly thereafter, on 12-30-92, the trial court finally set a hearing date for defendant's 1-24-92 correction motion (see item 7 above).

NOTE: (1) THIS RECORD CORRECTION MOTION, PENDING FOR ALMOST A YEAR, WAS FIRST FILED SHORTLY AFTER THE APPELLATE COURT RULED THAT THE AUDIO TAPE ITSELF COULD NOT BE USED AS A RECORD (See item 6 above); SAID MOTION INDICATED DEFENDANT'S INTENTION

TO PRESENT THE AUDIO TAPE AS EVIDENCE AT THE MOTION HEARING.

(2) THE AUDIO TAPE HAD BEEN SENT TO THE APPELLATE COURT JUST PRIOR TO THE LONG-DELAYED SETTING OF THIS HEARING. AS A RESULT, THE TAPE WAS NOT AVAILABLE FOR PRESENTATION AT THIS HEARING.

29. 1-15-93 - The defendant filed his motion for recusal of the trial judge (App., O) from hearing the record correction motion, based on the judge's status as a party, in his personal capacity, in the federal damages action regarding the falsification of the record.

NOTE: AT THIS POINT, THE FEDERAL ACTION WAS STILL PENDING IN THE UNITED STATES DISTRICT COURT (see item 22).

30. 1-20-93 - The trial judge denied the defendant's recusal motion (Hrg. Proc., Harris Rpt., p. 3), then presided at the record correction hearing over defendant's objection. At that hearing, the defendant requested that the record be corrected according to the earlier ruling granting record correction (Hrg. Proc., Harris Rpt., pp. 3-4), and also requested that the audio tape be returned to the trial court, authenticated by the court reporter under oath, and used as evidence in formulating a proper transcription (Hrg. Proc., Harris Rpt., pp. 13, 16-21, 32). None of this was allowed by the trial judge; instead, at the suggestion of the appellate court clerk (Hrg. Proc., Harris Rpt., pp. 45-46), the trial simply reiterated, without allowing the introduction of evidence, that the record as then constituted was final (Hrg. Proc., Harris Rpt., pp. 46-48). The record remained exactly as it had existed prior to this hearing: incomplete, inaccurate, and not modified according to the earlier grant of record correction. Defendant had still not been afforded the full evidentiary hearing to which he was entitled.

31. 1-29-93 - The appellate court orders that the recusal motion and transcript of the 1-20-93 correction hearing be transmitted to the appellate court.

32. 2-16-93 - The defendant filed supplemental brief in the appellate court, asserting that the trial judge's refusal to recuse, and his refusal to modify the record according to the earlier grant of record correction, violated the defendant's right to due process; the brief also asserted that improper contact between prosecution witnesses and jurors, outside of court, violated defendant's due process right to an impartial jury. After further

briefs by both appellant and appellee, the appeal was submitted upon the improperly settled record.

NOTE: THIS CASE REMAINED PENDING IN THE APPELLATE COURT WITHOUT FURTHER ACTION UNTIL 5-16-95, WHEN ORAL ARGUMENT WAS MADE; IN THE INTERIM, THE FEDERAL PROCEEDINGS WERE FINALIZED IN THE DISTRICT COURT AND APPEALED.

33. 3-11-93 - The District Court dismissed Greene's federal action without any evidentiary hearing regarding the allegations that the various state officials had deliberately falsified the state appellate record; the claims for injunctive relief were dismissed under the Younger abstention doctrine; the claim for damages was dismissed under the doctrine of judicial immunity. The District Court never ruled on the motion for restoration of the status quo, and the court never addressed the allegations and evidence regarding the evasive tactics of the state appellate judges and their absolutely dishonest and misleading assertions in their dismissal motion. The District Court opinion is copied into the attached Appendix (Ap., N).

NOTE: AT THE TIME OF FILING OF THE FEDERAL ACTION (8-20-92), THE CROTTY TRANSCRIPT (OF THE 11-6-91 RECORD CORRECTION HEARING) AND THE AUDIO TAPE (OF THE NEW TRIAL HEARING) WERE NOT INCLUDED IN THE APPELLATE RECORD. THESE ITEMS WERE TRANSMITTED ONLY AFTER THE DEFENDANT FILED HIS FEDERAL SUIT.

34. 5-6-94 - The Eleventh Circuit Court of Appeals (Case number 93-6291) affirmed the District Court decision, 22 F. 3d 1099 (11th Cir. 1994). On 7-12-94, rehearing was denied, 29 F. 3d 643 (11th Cir. 1994).

35. 10-11-94 - Greene filed in this Court (case number 94-6557) a petition for certiorari to the Eleventh Circuit Court of Appeals. The petition was denied, 115 S. Ct. 676 (1994), on 12-12-94, and rehearing was denied, 115 S. Ct. 1184 (1995), on 2-21-95.

36. In summary, Greene's federal appellate challenges were based upon the following precedents:

(1) Abstention is inappropriate where:

(a) the federal action is not annul the state judgments, Gerstein v. Pugh, 420 U.S. 103 (1975), Wooley v. Maynard 430 U.S. 705 (1977);

(b) the federal plaintiff seeks only to protect the right to meaningful appellate review and not to challenge the merits of the state proceedings, Pennzoil v. Texaco

481 U.S. 1, 21 (1987);

(c) the state judgment cannot be said to be under attack because no element of proof of the federal claim would negate any element of the state conviction, Heck v. Humphrey, 114 S. Ct. 2364 (1994);

(d) the allegations of the federal complaint call into question the impartiality of the state tribunal, Gibson v. Berryhill, 411 U.S. 564 (1975);

(e) the federal claim is based upon denial of access to state courts, Phillips v. Penna. Higher Educ. Assist. Ag'cy., 657 F. 2d 554 (3rd Cir. 1981);

(2) Dismissal under the judicial immunity doctrine is inappropriate where the basis for the federal claim is an action taken by a judge which is specifically prohibited to him or his office under state law, Stump v. Sparkman, 435 U.S. 349 (1978).

37. The federal courts refused to aid the state defendant in securing a truthful state appellate record, and refused to allow him an opportunity to prove the deliberate falsification thereof by state judges. The federal court justification for this refusal was that defendant had an "adequate remedy" in the state courts. The following items comprise that supposed "adequate remedy."

38. 9-8-95 - The state appellate court affirmed the conviction and entered an Opinion (App., A). The record upon which the conviction was affirmed is incomplete and inaccurate, and is essentially in the same condition as it existed at the close of the proceedings in the federal District Court.

At no time did this supposed "adequate remedy" include an evidentiary hearing at which defendant could authenticate and present the audio tape as evidence supporting his claims regarding the inaccuracy of the appellate record; requests for such a hearing were ignored by the state trial and appellate courts.

39. 9-22-95 - Defendant filed application for rehearing in the state appellate court, again asserting those issues listed in item 32 above.

40. 11-9-95 - The appellate court denied rehearing (App., B).

41. 11-27-95 - Defendant filed petition for certiorari in the Alabama Supreme Court (case number 1950321) asserting the same issues listed in item 32 above.

42. 11-29-95 - The Alabama Supreme Court granted certiorari

on return to remand (case number 1911878, see item 22 above) (App., C).

43. 1-3-96 - The Alabama Supreme Court granted certiorari on the latest petition (case number 1950321, see item 41 above), and consolidated this case with case number 1911878 for briefing and submission (App., D); the defendant filed his brief on the merits, asserting the issues listed in item 32 above.

44. 4-19-96 - The Alabama Supreme Court quashed both writs (App., E,F) and denied relief.

45. Charles Greene must now turn to this Court in his seemingly never-ending quest for that elusive "adequate remedy" for the falsification of the appellate record, of which remedy the federal courts had so earnestly foretold when they denied federal injunctive relief.

ARGUMENT

Question (1)

The appellate record in this case is incomplete and inaccurate; the petitioner has attempted to remedy this deficiency by filing record correction motions in the state courts. A hearing was held on this matter in the trial court on January 290, 1993, over which hearing the trial judge presided (Hrg. Proc., Harris Rpt., p. 1).

At the same time, an action was pending in the United States District Court, filed by petitioner against the trial judge, in his personal capacity, seeking monetary damages for the trial judge's extra-judicial acts in falsifying the record in petitioner's state appeal (App., O).

On January 15, 1993, the petitioner filed a recusal motion in state court (App., O), asserting that the trial judge, because of his status as a party in the federal damages action, was disqualified from presiding over the state record correction hearing; both proceedings involved the core element of whether the state appellate record falsely represented the actual events in the trial court. In the recusal motion, petitioner pointed out that the trial judge had a "direct interest" in the outcome of the state proceeding because of the effect his decision would have on the federal case in which he was a party (App., O).

The trial judge denied the recusal motion (Hrg. Proc., Harris Rpt., pp. 2-3) and heard the record correction motion. At this

hearing, the petitioner was denied an opportunity to present his evidence (audio tape of the new trial hearing) in support of his assertions; the judge also refused to put into effect his November 6, 1991 grant of another correction motion (Hrg. Proc., Harris Rpt., pp. 37-38). This hearing did not result in any corrections of the record.

The Court of Criminal Appeals affirmed, citing a state case based upon "the mental attitude or disposition of the judge toward the defendant himself", (App., A, part VI). The recusal motion in the instant case is not based upon personal bias or prejudice, but on direct pecuniary interest (App., O).

The Court of Criminal Appeals is in direct conflict, on two distinct points, with the prior decision of this Court in another Alabama recusal case, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). First, this Court specifically distinguishes cases of mere personal bias or prejudice from cases involving the direct pecuniary interest of the judge, Aetna, 475 U.S., at 821-822. Second, this Court specifically included, in the direct interest category, cases where a judge participates as a party in one case and as a judge in another case where he is called upon to decide an element involved in his personal case, Aetna, 475 U.S., at 823-826.

The instant case is such a case; the trial judge, while he was a party, in his personal capacity, in the federal lawsuit involving the falsification of the state record, sat as a judge in state proceedings squarely focused on the truthfulness or falsity of the state record. The trial judge stood to benefit directly by finding that the record was correct as it then existed, because that decision was bound to affect, to his advantage, the federal lawsuit involving the same element of correctness of the record. In the instant case the trial judge acted as a "judge in his own case", and his participation in the record correction hearing violated petitioner's due process rights; see Aetna, 475 U.S., at 823-825.

Essentially, the Court of Criminal Appeals characterizes this issue as a case of simple personal bias or prejudice, which leaves disqualification to the judge's discretion. Under this Court's Aetna holding, the instant case presents circumstances which disqualify the judge as a matter of law. The trial judge's denial of the recusal motion, and his participation in the correction hearing, violated petitioner's federal Constitutional right to due process of law, and the Alabama Court of Criminal

Appeals erred in affirming the trial court's actions.

Question (2)

Two prosecution witnesses, Scott Patrick and James Wordlaw, exposed jurors to case-related information outside of the courtroom during a trial recess. (Rec., p. 130); in the presence of jurors they discussed Wordlaw arrest and his previously given testimony. Wordlaw's state of mind, as a result of his arrest, was violent anger at the petitioner: just before trial hea had shouted "fresh meat, fresh meat" at defendant (Rec., p. 128; N.T. Hrg., pp. R35-R36). Both Patrick (N.T. Hrg., P. R25) and Wordlaw (N.T. Hrg., p. R33) admitted to discussing the above-mentioned matters outside the courtroom. It is not known what other matters they might have discussed at that time. Wordlaw's testimony, and his credibility and bias, were of utmost importance at the trial: Wordlaw, defendant claimed, had invited him to remain in the store (Rec., pp. 34-35, 38-40, 58-59) on the day of the arrest, and had then slipped back into a side office and called police to arrest defendant for trespassing, under orders from Wordlaw's superiors.- prior invitation was key to petitioner's defense.

Petitioner alleged, in his motion for new trial (Rec., pp. 117-125), that this improper contact with jurors violated his right to trial by an impartial jury free from improper influences (Motion, items 6 and 7). At the new trial hearing, petitioner established, through evidence taken from witnesses Patrick, Taylor, and Wordlaw (Rec., p. 130; N.T. Hrg., pp. R25, R33), that such improper contact was indeed made. Also at this hearing, the prosecutor presented affidavits from Patrick and Wordlaw concerning this incident.

These affidavits were not received in the mail by defendant until after the hearing; at the hearing, defendant objected to the submission of them because the judge would not allow him to review the affidavits before the hearing ended. These objections to submission of the affidavits were omitted from the record (App., I, items 2 and 4) which has still not been corrected to include these matters.

The new trial motion was overruled, an defendant asserted on appeal that the improper contact between witnesses and jurors had violated his due process right to an impartial jury. The Court of Appeals affirmed the trial court.

The decision of the Court of Criminal Appeals conflicts with the holding of this Court, in Turner v. Louisiana, 379 U.S. 466 (1965), that such contact subverts the basic guarantees of trial by jury.

The Court of Criminal Appeals decision is also in conflict with this Court's decision in Remmer v. United States, 347 U.S. 227 (1954), in which case it was held that such contact with jurors is presumptively prejudicial and, if the prosecution fails to establish (after notice and a hearing in which defendant is entitled to participate) that such contact was harmless, then defendant is presumed to have been denied a fair trial.

The court of appeals decision (Rec., p. 144) and Wordlaw (Rec., p. 151); these affidavits clearly relate to events of February 28, 1991, and are therefore irrelevant to the incident of improper contact with jurors which took place on March 1, 1991 (Rec., p. 130). The prosecution certainly did not, by introduction of these irrelevant affidavits, meet the heavy burden placed on it by the Remmer decision; under Remmer, prejudice to the defendant is still presumed, unrebutted, and the affirmance of the overruling of the motion for new trial on this ground was error.

The Court of Criminal Appeals decision also is in conflict with the Remmer decision in another way. Remmer also requires that where such improper contact is alleged, defendant be entitled to participate in a hearing on that matter. The failure of the trial court to allow defendant to view these affidavits and cross-examine the affiants denied petitioner an opportunity to fully participate in the presentation of evidence on this matter; see Pointer v. Texas, 380 U.S. 400 (1965).

On this question, petitioner is hampered by the presently incomplete record. His objection to the Response (in which the prosecution's affidavits were contained) does not appear of record, although petitioner has filed correction motions (App., I, items 2 and 4), he has not been afforded an opportunity to present evidence that he did indeed make objections to the response at the new trial hearing. See Questions (1) and (3) of this petitioner, where the improper settlement of the record is directly in issue.

Question (3)

As is set out more fully in the preceding Statement of the

Case, petitioner has, for five years now, made repeated attempts to present evidence at a hearing to prove his allegations regarding the settlement of the record (2d ?S.R., pp. 9, 25-27, 28, 81, 98, 100, 139); (Hrg. Proc., Harris Rpt., pp. 3-4, 13, 16-21, 32, 46-48); (Docket Sheet, Appendix, H); (Appendix, I, J,M, N). He has attempted to have the audio tape recording, of the new trial motion, authenticated under oath and presented as evidence in this regard. The appellate court has ruled that the tape itself cannot constitute a record, and so the petitioner has no other means of introducing the tape than by authentication and presentation as evidence at an evidentiary hearing. Although "hearings" have been held on record correction, on none of these occasions has petitioner been allowed to have the tape authenticated under oath (a requirement for its introduction under state practice - and a necessary precaution considering the past behavior of the Alabama Courts on this matter); on none of these occasions has petitioner been allowed to present the tape as evidence in support of the claims made in his record correction motion (App. I). The Court of Criminal Appeals nonetheless opined that record settlement in this case was "more than sufficient" (app., A, page 8).

This decision by the appellate court is in conflict with this Courts' holding in Chessman v. Teets, 354 U.S. 156 (1957), that, despite the fact that the state appellate courts have held the record to be adequate, the defendant is still entitled to a record settled in accordance with due process, Chessman, 354 U.S., at 164, esp. n. 12; the petitioner is entitled to an opportunity to present his evidence, see Chessman, 354 U.S. at 162 n. 7, at a full evidentiary hearing. To deny petitioner an opportunity to present the audio tape, and other evidence, is to deny him an effective "voice" in determining the accuracy of the record, and is inconsistent with due process, Chessman, 3554 U.S., at 164. The appellate court erred in affirming conviction upon this seriously disputed record, and the determination of the accuracy of this record, without affording Greene an opportunity to present his evidence, is inconsistent with due process under the Fourteenth Amendment.

Charles J. Greene

Charles J. Greene, petitioner
1274 Adell Street
Prattville, Alabama 36066
(334) 365-5197

APPENDIX

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1994-95
CR-90-1464 (SC-1911878) Released: Sept. 8, 1994
Charles J. Greene
v.
City of Montgomery
Appeal from Montgomery Circuit Court
(CC-90-5109)
ON RETURN TO REMAND

COBB, JUDGE

This case was originally assigned to another judge on the Alabama Court of Criminal Appeals. It was reassigned to Judge Cobb on January 17, 1995.

The appellant, Charles J. Greene, was charged with the offense of criminal trespass in the third degree. His case was tried in the municipal court of the City of Montgomery and he was found guilty. The appellant was fined $150 and court costs. He appealed to the circuit court for a trial de novo. The circuit court upheld the conviction and fine. The appellant filed a motion for a new trial and the circuit court held a hearing on that motion. The circuit court denied the appellant's motion for new trial.

The evidence presented by the City at trial tended to show that on March 19, 1990, the appellant was fired from his job at Auto Zone, an automobile parts store in Montgomery, Alabama. Paul Smith, the are advisor for Auto Zone stores testified that the appellant was told not to come into the store again. Other witnesses also testified at trial that the appellant had been told to stay out of the store. Later, the appellant was seen in the store on several occasions. There was trial testimony that the appellant was making it difficult for other store employees to do their jobs.

On April 3, 1990, the appellant was charged with the offense of criminal trespass in the third degree. The appellant was accused of entering the premises of the Auto Zone store on Fairview Avenue in Montgomery after being told not to reenter the premises.

The appellant contends that the presence of the bailiff in the

jury room during jury deliberations warrants a new trial. Specifically, the appellant argues that the bailiff entered the jury room and remained there for a period of 10 to 20 minutes. He alleges in his brief to this court to this court that his attorney made it clear to the trial court that if the bailiff was not made to come out of the jury room, she would move for a mistrial. However, the appellant was unclear whether a formal motion was made. The appellant did not know the name of the bailiff and failed to bring the bailiff before the court, despite the fact that the judge gave the appellant additional time to produce the bailiff. There was testimony by the appellant's attorney, who stated that the bailiff was probably in the jury room for 5 to 10 minutes. The appellant's attorney testified that she remembered one of the jurors knocking on the door with a question or to tell the court that the verdict was ready. The attorney testified further that no motion for a mistrial or "anything like that" was made, although we note that a motion for a new trial was filed.

In Ray v. State, 527 So. 2d 166, 168 (Ala. Crim. App. 1987), a conversation between the jury foreman and the bailiff took place during jury deliberations. Although defense counsel was aware of the conversation when it occurred, no objection was made until the motion for a new trial was made. This court held that the issue was not preserved for our review because the objection was not timely.

Although the appellant claims that an objection was made at trial to the bailiff's presence in the room during jury deliberations, the record does not support this assertion. Further, defense counsel stated that no objection was made on this issue at trial. Since the appellant failed to object in a timely manner, this issue is not preserved for appellate review. Ray.

II

The appellant claims that the trial court refused to permit him to question the prosecuting attorney, Patricia Kelley, at the hearing on the motion for a new trial and this refusal constituted a denial of his right to a full and fair hearing on this motion. It is clear from the record that the appellant's claim as to this issue is totally without merit. The trial court did not require Kelley to take the stand at least "until the City has an opportunity to have another lawyer." However, the court did permit the appellant to question Kelley, as the following illustrates:

"THE COURT: I will hear the testimony. I will not

require her to testify; but I will hear testimony from them. I will not require her until the City has an opportunity to have another lawyer; but I will permit you to call those two witnesses.
"MR. GREENE: In order for me to be able to fully question the two witnesses just mentioned, it would be necessary to question Patricia Kelley herself to provide the basis for that.
"THE COURT: What do you want to ask her?
"MR. GREENE: First, did she sign this?
"THE COURT: Did you sign it?
"MS. KELLEY: Yes, sir. You have ruled on those grounds.
"THE COURT: She signed it and the Court takes judicial knowledge that it was written and prepared by Ms. Kelley. Anything further you want to ask?
"MR. GREENE: I would like to introduce into evidence the affidavit of Moe Taylor. I will authenticate that.
"THE COURT: Who is Moe Taylor?
"MR. GREENE: He was another witness at trial.
"THE COURT: What does this have to do with the correctness of the motion?
"MR. GREENE: Moe Taylor's affidavit will state that the grounds mentioned in this motion to continue are not what they are.
"THE COURT: Do you have any objection to him offering that?
"MS. KELLEY: No, sir. It has been filed with his motion.
"THE COURT: That is admitted. Anything else you want to ask Ms. Kelley? You say you can't intelligently question these witnesses about their being sick until you ask her questions. I'm trying to get that tended to.
"MR. GREENE: Did you make a telephone call to Paul Smith at Fairview Street on the date of the trial?
"THE COURT: I don't see that that has anything to do with these two witnesses. Call the witnesses referred to in this motion, the one that has bedridden with pneumonia, and the other one that was out of town.

Who was the one bedridden?"

As evidenced by the above dialogue, this issue is without merit.

III

The appellant argues that he trial court erred in overruling his motion for a new trial because, he says, it disregarded the evidence of presumptive prejudice to the appellant caused by the bailiff's presence in the jury room. We have addressed the merits of this issue in part I of the opinion. The appellant failed to object at trial or to move for a mistrial. The appellant failed to preserve this issue for appellate review. Ray.

IV

The appellant contends that the trial judge failed to act on his motion to correct and supplement the record on appeal. On September 26, 1991, the Court of Criminal Appeals ordered the appellant to file a motion in circuit court for a corrected and supplemental record. The appellant complied with this order by filing the motion on October 8, 1991. On January 23, 1992, this court ordered the trial court either to certify the record as accurate and complete or if the trial court determined that the record was incomplete, to note that a corrected record be filed. On February 4, 1992, pursuant to the order of the Court of Criminal Appeals, the trial court, after reviewing the record, issued an order stating that the record on appeal did, in fact, disclose what occurred in the trial court. On June 26, 1992, the judgment was affirmed by unpublished memorandum. On November 10,. 1992, the Alabama Supreme Court remanded this cause to this court for further proceedings. On November 12, 1992, this court ordered that "a supplemental record containing all documents necessary to make record complete be filed on November 16, 1992, December 22, 1992, and on February 2, 1992. Several hearings were held concerning the correction of the record on appeal.

The trial court granted the appellant's motion to correct the record and ordered that all matters concerning the appellant's case be submitted to this court, including the audio tape of the hearing on the motion for new trial. The court reporter testified that the record is complete and that it accurately reflects the proceedings in the trial court and that everything included in the record had been submitted to this court. The trial court granted every request by the appellant to correct the record and repeatedly asked the appellant what he wishes to have

corrected in the record. However, the court indicated it could not create a record concerning matters that did not occur at the trial or during the hearing on the motion of a new trial.

The appellant in his brief on appeal again argues that the record is inaccurate, but he does not specify what is incorrect about the record or offer any corrections. The trial court stated that everything material to either party is, in fact, included in the record and that nothing material to either party has been omitted form the record and that nothing material was misstated therein. The trial court's action in this matter was more than sufficient. In fact, the trial court extended every consideration to the appellant, who, although not versed in the law chose to represent himself. There is no merit to this issue.

V

The appellant's fifth issue is whether the consideration of this appeal based upon the present record on appeal is in violation of the appellant's right to procedural due process. We addressed the merits of this argument in part IV of this opinion. The contention is without merit.

VI

The appellant filed a lawsuit in federal court alleging that the record on appeal in this case was incomplete. The appellant contends that the trial judge should have recused himself once the lawsuit was filed because the trial judge was a party to the lawsuit. The lawsuit has subsequently been dismissed.

> "A motion to recuse must be addressed to the judge challenged. The ruling of that judge on the motion will not be reviewed on appeal in the absence of clear evidence of prejudice or bias. Slinker v. State, 344 So. 2d 1264 (Ala. Crim. App. 1977). The prejudice or bias against the appellant required to disqualify the judge must be of a personal nature, as opposed to a judicial bias. Seibold v. State, 382 So. 2d 1141 (Ala. Crim. App. 1979), cert. denied, 382 So. 2d 1146 (Ala. 1980); Pannell v. State, 356 So. 2d 219 (Ala. Crim. App. 1977), cert. denied, 356 So. 2d 663, (Ala. 1976), certi. denied. 429 U.S. 1026 (1976); Slinker, supra, Canon 3 A (5), Alabama Canons of Judicial Ethics.
>
> "The words bias and prejudice, as used in this context, refer to the mental attitude or disposition of the judge toward the defendant

himself, and not to the judge's views regarding the crime with which the defendant is charged. In Re White, 53 Ala. App. 377, 300 So. 2d 420, cert. denied, 293 Ala. 778, 300 So. 2d 439 (1974)...."

Lokos v. State, 434 So. 2d 818, 822 (Ala. Crim. App. 1982).

The appellant has failed to demonstrate to this court that the trial judge was prejudiced against him. In fact, the record shows that the trial court "bent over backwards" to accommodate the appellant concernign the correction of the record on appeal. As we discussed in part IV above, the trial court ordered that everything in the record be submitted to this court and told the appellant that it would correct anything in the record that needed correcting but that it would not create a record concerning matters that did not occur at trial. Further, the trial court was in the best position to correct the record since it presided over the appellant's trial and would have been aware of what occurred during the trial. This argument lacks merit.

VII

The appellant contends that the trial court engaged in ex parte communications with the prosecutor because the trial court asked the prosecutor to "get [it] some law on what the law says about speculating on a verdict on things of this nature." In response, the prosecutor wrote the following letter to the trial court:

"Enclosed please find a couple of cases I have found, which indicate that a defendant in a criminal case must object to circumstances regarding the jury and may not assert the same for the first time in a Motion for New Trial.

"Please consider this case law in making a determination on Defendant's Motion for New Trial in the above styled cause."

(S.R. #1, 8.) The request for relevant law by the trial court and the response by the prosecutor do not constitute an ex parte communication.

VIII

The appellant contends that his motion for a new trial should have been granted because, he said, two witnesses in this case discussed this case in front of the jury. Both of these witnesses

offered affidavits in which they stated that they did not talk about the case to each other in the presence of the jury. The trial court did not err by refusing to grant a new trial on this ground. This case is affirmed.
AFFIRMED.
All the Judges concur.

B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
Court of Criminal Appeals No. 90-1464 SC1911878
(Montgomery Circuit Court No. 90-5109)
Charles J. Greene vs. City of Montgomery
Appellant Appellee
Dear Sir or Madam:

You are heareby notified that on November 9, 1995, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39 (k) motion denied.

LAKE MANN
CLERK
COURT OF CRIMINAL APPEALS

C

IN THE SUPREME COURT OF ALABAMA
November 29, 1995

1911878

Exparte Charles J. Greene. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Charles J. Greene v. City of Montgomery) (90-1464) (Montgomery: CC-90-5109-PH)

NOTICE

Petition for write of certiorari to the Court of Criminal Appeals is granted. Oral argument will not be granted in this cause. See Rule 39 (f), Alabama Rules of Appellate Procedure, for instructions regarding the filing of additional briefs.

B

PER CURIAM - HOOPER, CJ., ALMON, HOUSTON, INGRAM AND BUTTS, JJ.

D

IN THE SUPREME COURT OF ALABAMA
January 3, 1996

1950321

Ex parte Charles J. Greene. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Charles J. Greene v. City of Montgomery) (90-1464) (Montgomery: CC-90-5109)

NOTICE

Petition for writ of certiorari to the Court of Criminal Appeals is granted. Oral argument will not be granted in this cause. See Rule 39 (f), Alabama Rules of Appellate Procedure, for instructions regarding the filing of additional briefs.

This case is consolidated with 1911878 for briefing and submission.

PER CURIAM - HOOPER, CJ., ALMON, HOUSTON, INGRAM AND BUTTS, JJ.

E

IN THE SUPREME COURT OF ALABAMA
April 19, 1996

1911878

Ex parte Charles J. Greene. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Charles J. Greene v. City of Montgomery) (90-1464) (Montgomery: CC-90-5109)

CERTIFICATE OF JUDGMENT

WHEREAS, on November 29, 1995, a Writ of Certiorari to the Court of Criminal Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure.

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

D

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Criminal Appeals be, and the same is hereby, quashed,and the Petition for Writ of Certiorari be, and the same is hereby, quashed, at the cost of the petitioner, for which let execution issue. NO OPINION.

PER CURIAM - HOOPER, CJ., ALMON, HOUSTON, INGRAM AND BUTTS, JJ., concur.

F

IN THE SUPREME COURT OF ALABAMA
April 19, 1996

1950321

Ex parte Charles J. Greene. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Charles J. Greene v. City of Montgomery) (90-1464) (Montgomery: CC-90-5109)

CERTIFICATE OF JUDGMENT

WHEREAS, on January 3, 1996, a Writ of Ceritorari to the Court of Criminal Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Wirt of Certiorari heretofore issued to the Court of Criminal Appeals be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied, at the cost of petitioner, for which let execution issue. NO OPINION.

PER CURIAM - Hooper, CJ., Almon, Houston, Ingram and Butts, JJ., concur.

G

CITY OF MONTGOMERY
Plaintiff CASE NO. CC-90-5109

F

VS.
CHARLES GREENE,
Defendant.

ORDER

This matter is before the Court on the Motion for New Trial filed in this case by the Defendant, Charles Greene. Having considered said Motion, and the evidence presented in Open Court, it is the opinion of this Court that the Motion for New Trial is due to be overruled. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed in this case be and the same is hereby OVERRULED.

DONE this the 28th day of May, 1991.

/s/
Joseph D. Phelps, Circuit Judge

H

COURT OF CRIMINAL APPEALS
FORMAL DOCKET SHEET

Criminal Appeals Number: 90-1464
Charles J. Greene vs. City of Montgomery
Montgomery Circuit Ct. No.: 90-5109
Date of Notice of Appeal: 7-8-91
Ct. Rep. Cert. of Comp. Date: 7-7-91
RECORD ON APPEAL FILED: 8-27-91
CERT. OF COMP. DATE: 8-27-91
Supplemental record filed: 11-16-92
2nd Supplemental record filed: 12-22-92
Exhibit (tape) filed: 12-22-92
(Tape to be returned to circuit clerk) 12-22-92

Briefs:
Pro se Brief filed: 9-24-91
Supplemental Brief filed: 2-28-92
Reply brief filed: 4-10-92
Pro se Supp. brief filed: 12-8-92
Brief filed: 3-27-92
7-day extensions to: 3-29-92
Supp. brief filed: xx

9/26/91 Appellant directed to file motion for corrected/ supplemental record in circuit court; to be filed within 21 days from this date.

9/26/91 Appellant's request for originals to be filed denied.

10/10/91 Time for filing appellant's supplemental brief stayed pending Rule 10(f) motion. If 10 (f) motion granted, supplemental record must be filed by 11/21/91. If denied, notion of such action is to be filed. Appellee's briefing time shall run from filing of appellant's supplemental brief.

11/25/91 Pro se motions for order to show cause, for amendment of order and for enlargement of time for filing brief denied. If Rule 10f motion is granted, appellant shall have 14 days from filing of supplemental record to file supplemental brief. Time for filing appellee's brief shall run from expiration of time provided herien for filing appellant's supplemental brief.

12/6/91 Copy of pro se motion to vacate order filed.

12/31/91 Pro se motion to remand or in the alternative to reverse the instant conviction and remand for a new trial filed.

1/21/92 Appellee's response to motion to remand or to reverse and remand for new trial and response to motion for order to show cause filed.

1/22/92 Appellant's reply to response to motion to remand filed.

1/23/92 Trial court ordered to either certify that record is accurate and complete or if trial court determines that record is incomplete, trial court ordered to file corrected record by 2/27/92.

1/31/92 Appellant's motion for modification of order denied.

2/13/92 Copy of trial judge's order of 2/4/92 filed stating that record on appeal is complete.

2/14/92 Appellant's motion to vacate order denied. Appellant shall be allowed 14 days from this date to file his supplemental brief. Time for filing of appellee's brief shall run from date of filing of appellant's supplemental brief.

2/28/92 Pro se motion for order to transmit supplemental record and motion for enlargement of time for filing supplemental brief denied.

3/3/92 Appellee's response to appellant's motion for enlargement of time for filing supplemental brief and to appellant's motion for order to transmit supplemental record filed.

3/5/92 Appellant's reply to response to motion for enlargement of time for filing brief filed.
3/27/92 SUBMITTED ON BRIEFS (D)
6/26/92 AFFIRMED BY MEMORANDUM. (SEE MEMO)
7/10/92 Application for rehearing and Rule 39(k) Motion filed (pro se).
8/21/92 RULE 39(k) MOTION DENIED; APPLICATION FOR REHEARING OVERRULED.
9/4/92 Petition for Certiorari filed in Alabama Supreme Court.
11/10/92 Cause remanded to this Court by Alabama Supreme Court for further proceedings.
11/12/92 Order from this Court stating that a supp. record containing all documents necessary to make record complete be filed within 7 days of this order. Appellant will be allowed 21 days from the filing and service of the supp. rec. to prepare & serve his brief relative to the supp. rec. The appellee shall have 14 days from the service of the appellant's brief to file its brief in response.
11/16/92 Supplemental record on appeal filed. Appellant's brief is due on 12/7/92.
12/1/92 Appellant's motion for correction of supplemental record on appeal and motion for enlargement of time for filing brief filed.
12/4/92 Appellant's motion for 7-day extension of time for filing brief filed. (Granted 12/9/92)
12/14/92 Appellee's motion for 7-day extension of time for filing brief filed. (Granted 12/18/92)
12/15/92 Circuit clerk ordered to file supp. record by 1/5/93 containing items listed in this order. (see order)

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA
CITY OF MONTGOMERY,
Plaintiff Case No. CC-90-5109-PH
v. (Court of Criminal Appeals Case
CHARLES J. GREENE, No. 90-5104)
Defendant

MOTION FOR CORRECTED AND SUPPLEMENTAL RECORD ON APPEAL

Pursuant to the directive of the Court of Criminal Appeals, dated September 26, 12991, a copy of which is enclosed with this motion, and under authority of ARAP, Rule 10(f), the

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defendant moves the court to direct that the inaccuracies hereinafter presented, with regard to the Record on Appeal, be corrected, and to further direct that a hearing be held on the triable issues of fact presented in this motion, and to cause such corrections to be certified and transmitted to the Court of Criminal Appeals of Alabama in the form of a supplemental record.

As grounds for this motion, the defendant says that the omissions and misstatements enumerated below are material to his appeal in that they indicate reversible errors, as will be more particularly described below, and that a consideration of defendant's appeal sands the requested corrections, or a hearing thereon, would greatly prejudice the defendant-appellant and amount to a violation of the defendant's right to have his appeal considered upon a proper and adequate Record on Appeal, and, thus, a violation of the defendant's right to procedural due process guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

The following correction should be made to the transcript of the proceedings at Trial:

The Record of Appeal should, but does not, indicate the presence of the bailiff in the jury room--for some five to ten minutes--during the deliberations, the judge's knowledge of this fact, the defendant's request to have the bailiff removed from said jury room, and the judge's removal of the bailiff from the jury room, all of this occurring at page 80, lines 9 through 13, of the Record of Appeal.

In support of his above-described contentions, the movant offers the testimony presented at pages R-12 through R-18 of the Record of Appeal.

This omission is material in that it indicates a plain and palpable error on the part of the trial judge in failing to sua sponte declare a mistrial.

This omission is material in that it indicates a violation of the defendant's right to a trial by impartial jury.

The following corrections should be made to the transcript of the proceedings at the Hearing on the Motion for New Trial:

1. At page R-2, between the second-to-last line and the last line, the Record on Appeal should reflect that the defendant made objection to the response on the grounds that he had not seen the response, that the defendant moved the court to allow him time to review the response on the grounds that he had not

seen it, and that the defendant made request for a copy of the Response, all of which is omitted from the Record on Appeal.

The defendant offers, in support of the inclusion of the above matter in the Record on Appeal, item number one of his Affidavit, enclosed with this motion.

This matter is material in that it indicates a violation of the defendant's right to confrontation with the witnesses and evidence against him.

2. At page R-4, between line 23 and line 24, the Record should reflect the defendant's offer to continue the hearing to such time as the City could find another lawyer, and thus enable the defendant to examine Patricia Kelley as a witness.

In support of the above-proposed correction, the defendant offers item number two of his Affidavit.

This matter is material in that it indicates a violation of the defendant's right to present witnesses and evidence in his behalf.

3. At page R-4, between line 27 and line 28, the Record should show that the defendant again made objection to the Response on the grounds that he had not seen it, and that the defendant again requested to see it and to be given time to review it.

In support of this contention, the defendant offers item number three of this Affidavit.

4. At page R-11, at line 21, the Record should reflect that the defendant stated, as grounds for his objection to the log, that he had not seen the log, and that the logs could be changed and often were changed.

In support of this proposed correction, the defendant offers item number four of his Affidavit.

This matter is material in that it indicates a violation of the defendant's right to confrontation with the witnesses and evidence against him, and also material in that it indicates a plain and palpable error on the part of the trial judge in overruling the objection.

5. The Record should show that the defendant stated that he had heard Mr. Taylor make the statements contained in Taylor's affidavit and had seen Taylor sign said Affidavit. This statement should appear at one or more of the following locations, to wit: at page R-6, liens 2 to 4; at page R-18, lines 12 to 18; at page R-19, liens 23 to 25; at page R-24, line 11.

In support of the foregoing, the defendant offers item number

five of his affidavit.

This matter is material in that a failure to include it would give the false impression that said Taylor's Affidavit was not properly admitted into evidence.

6. At page R-46, line 23, to page R-47, line 12, the Record is inaccurate and should read:

THE COURT: Any objection to extending this hearing to 30 days from today?
(MS. KELLY: No, Sir.)
MR. GREENE: That certainly is not a problem if the prosecution agrees to this, and the Court.
THE COURT: The prosecution agreed.
MR. GREENE: Alright, then the defendant agrees to continue this hearing to 30 days from today.
THE COURT: Or anytime before that.
MR. GREENE: And the prosecution agrees to this extension?
THE COURT: Didn't you hear her?
MR. GREENE: No, Sir.
MS. KELLY: Prosecution does agree.
THE COURT: Alright, what else?
MR. GREENE: That's all I have for today.

In support of the foregoing, the defendant offers item number six of his Affidavit.

This matter is material in that it indicates an agreement by the parties to continue the hearing to a date certain, and thus, its inclusion would put the trial judge in error for his subsequent failure to hold the hearing as continued.

7. At page R-30, line 13, the record should reflect that, at this point, the defendant was detained by the bailiff and taken outside the courtroom, and should further reflect, that defendant was not again present in the courtroom until the Court's first statement on page R-31.

In support of this contention, the defendant offers item number seven of his Affidavit.

This matter in that it indicates a plain and palpable error on the part of the trial judge in allowing the giving of testimony outside the presence of defendant, in violation of the defendant's right to confrontation, and other substantive rights.

8. At page R-6, lines 14 and 15, the Record should reflect that the defendant's question further specified that the question related to the original date of the trial, August 3, 1990.

This matter is material in that it indicates that the question did, indeed, relate to the two witnesses which the court mentioned in this following comment, and, therefore, indicates a violation of the defendant's right to present witnesses and evidence in his behalf.

9. At page R-35, there is an inaccurate reporting of the entire exchange, and omission, toward the end, of the following:

MR. GREENE: Just for no reason you decided to say "fresh meat, fresh meat"?

MR. WORDLAW: When I said that, I was just repeating what I heard in jail.

MR. GREENE: When you said that. When you said that, what did you mean by it?

MR. WORDLAW: I didn't say that.

MR. GREENE: You have just admitted you said it, what did you mean by it?

MR. WORDLAW: Well, if I said that, I didn't mean anything by it. It wasn't directed toward you.

This matter is material in that it indicates the extremely evasive attitude of this witness and, thus, it would go toward a showing of a plain and palpable error no the part of the trial judge in overruling the defendant's Motion for New Trial.

The following items should also be added to the Record on Appeal:

1. The original of the mileage log, a photocopy of which is located at page 150, should be included with the Record on Appeal, for the reason that any willful alternations of said mileage log would be more easily discernable on the face of the original than they are on the present photocopy.

This matter is material in that it indicates lack of good faith and evasiveness on the part of the prosecution and prosecution witnesses.

2. The audio tape recording of the proceedings at the hearing on the Motion for New Trial, which the defendant has sought to discover, and which he intends to present as evidence at the hearing on his record correction motions, should be certified and transmitted to the Court of Criminal Appeals as tangible evidence directly bearing on those issues presented on appeal.

The audio tape recording is material in that it is the best evidence (being less fallible than human memory) of what truly

occurred at the hearing on Motion for New Trial.

3. The following pleadings and other items should be included in the supplemental record, as they have been filed after transmission of the present Record of Appeal and could not have been included therein. The aforesaid items are: the defendant's Motion to Correct and Supplement the Record on Appeal, this correction motion, the transcripts of any hearings on the record correction motions, and all other pleadings and orders which appertain to the correction of the record.

WHEREFORE, the defendant requests that the Court grant this motion, and further requests a hearing on the triable issues of fact presented in this motion, and also requests that the Court grant such further relief as will effectuate the presentation of a proper and adequate Record on Appeal.

Enclosed with this motion are the defendant's affidavit, a copy of the Directive from the Court of Criminal Appeals, and a photocopy of the above-mentioned mileage log.

I certify that I have this day served copies of this motion on the trial court, on the attorney for the City of Montgomery, by placing same in the United States mail, postage prepaid, and properly addressed, this 24th day of January, 1992.

/s/_____
Charles J. Greene, Defendant-Appellant
1274 Adell Street
Prattville, Alabama 36066

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
THE CITY OF MONTGOMERY
Plaintiff

v. Criminal Case No. Cc-90-5109-PH

CHARLES J. GREENE,
Defendant

MOTION FOR ORDER SETTING HEARING ON MOTION FOR CORRECTED AND SUPPLEMENTAL RECORD ON APPEAL

Comes now the defendant, Charles J. Greene, and moves this court for an order setting a hearing on the defendant's Motion for Corrected and Supplemental Record on Appeal (A.R.A.P., Rule 19(f) Motion), as grounds says:

1. The defendant has filed a motion with this court under

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A.R.A.P., Rule 10(f), with this court.

2. The defendant has not yet been given an opportunity to present his witnesses and evidence concerning the triable issues of fact presented in his A.R.A.P., Rule 10(f) motion.

3. The defendant has a right, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to a hearing at which he may have a voice in determining and settling the disputes involving the accuracy of the Record on Appeal in the appeal of this case.

Wherefore, the premises considered, the defendant requests that this court enter an Order setting a hearing on the defendant's A.R.A.P., Rule 10(f) motion.

I certify that I have this day served copies of this motion on the trial judge, and on the attorney for the City of Montgomery, by placing same in the United States mail, postage prepaid, and properly addressed, this 24th day of January, 1992.

/s/_____
Charles J. Greene, defendant
1274 Adell Street
Prattville, Alabama 36066

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHARLES J. GREENE,
Plaintiff,
vs. CASE NO. CV-92-A-1062-N
JOSEPH D. PHELPS, etc., et al.,
Defendants

ORDER

This case is before the court on the motion of the plaintiff to be allowed to proceed in forma pauperis and the motion for temporary restraining order.

It is ORDERED that the motion to proceed in forma pauperis is GRANTED, and the plaintiff is allowed to so proceed.

The plaintiff's motion for a temporary restraining order without notice is DENIED.

The plaintiff's motion for a temporary restraining order is set

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for hearing on Friday, August 21, 1992, at 2:00 p.m., fourth floor courtroom, Frank M. Johnson, Jr. Federal Building and Courthouse, subject to the defendants being given notice and an opportunity to be heard. The clerk is DIRECTED to deliver copies of this order to the plaintiff for service upon the defendants.

DONE this 20th day of August, 1992.

/s/
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHARLES J. GREENE,
Plaintiff,

vs. CASE NO. CV-92-A-1026-N

JOSEPH D. PHELPS, etc.,
et al.,
Defendants.

ORDER

This case came before the court on this day for hearing on the Plaintiff's motion for a temporary restraining order. The Plaintiff was in court pro se, and the Defendants were represented by Deputy Attorney General Robert M. Weinberg.

It was made known to the court that the Alabama Court of Criminal Appeals denied the Plaintiff's application for rehearing prior to the hearing. The motion for a temporary restraining order is, therefore, DENIED as moot.

The Plaintiff is given until September 11, 1992, to file a response to the Defendant's "Motion to Dismiss," filed on August 21, 1992, at which time the motion will be taken under submission for determination without oral argument.

DONE this 21st day of August, 1992.

/s/
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CHARLES J. GREENE,
Plaintiff

vs. Case No. CV-92-a-1026-N

JOSEPH D. PHELPS,
etc., et al.,
Defendants

MOTION FOR MANDATORY INJUNCTION TO RESTORE STATUS QUO

Comes now the plaintiff, Charles J. Greene, and moves this court for a mandatory injunction to defendants John Patterson, William M. Bowen, Jr., Sam Taylor, H. Ward McMillan, and Mark G. Montiel, to restore the status quo existing at the time that defendants were given notice of this action, and in support thereof states as follows:

1. Plaintiff has filed a verified complaint in this action requesting that this court enjoin the above named defendants from proceeding forward with the plaintiff's state court appeal until such time as the Record on Appeal therein can be made to conform to the truth.

2. On August 20, 1992, this action was filed in this court and, on the same date, the defendants were given notice of this action as is shown by the return of service of summons and complaint now on file with this court.

3. Despite the fact that the above named defendants had notice of this action, said defendants nevertheless proceeded, on August 21, 1992, to complete the acts sought to be enjoined, and rendered a decision on this plaintiff's application for rehearing in his state court appeal, as is shown by Exhibit B, attached hereto.

4. Unless this plaintiff can obtain an order restoring the status quo as it existed at the time notice was given to defendants, staying his state appellate proceedings, and suspending the operation and effect of the decision, attached hereto as Exhibit B, on his state application for rehearing, said plaintiff will suffer irreparable harm, in that:

(a) he will be deprived of his right to access to the courts in his state court appeal and will further be deprived of any opportunity to vindicate said right in the state appellate process, and

(b) the above-described decision will operate so as to

interfere with this court's ability to properly dispose of this action on the merits and will render meaningless the requested relief.

5. Plaintiff has no adequate remedy at law in that by the very nature of the acts sought to be restrained in this action, those acts cannot be remedied in the state courts.

6. The harm, if any, caused to defendants by a restoration of the status quo, existing at the time of notification to defendants of this action, would be negligible.

WHEREFORE, the plaintiff prays that the court enter its order: (a) restoring the status quo, as it existed at the time notice was given to defendants of this action, (b) suspending the operation and effect of the order of the Court of Criminal Appeals of Alabama, dated August 21, 1992, regarding the plaintiff's application in case number 90-1464, (c) staying any further proceedings in this plaintiff's state court appeal until such time as this court might proceed to an adjudication of this action, (d) requiring defendants John Patterson, William M. Bowen, Jr., Sam Taylor, H. Ward McMillan, and Mark G. Montiel, to refrain from taking any further action in plaintiff's state court appeal until determination of this action, and (e) granting such other, further, or different relief as to this court seems just in the premises.

/s/
Date of Signature

/s/
Charles J. Greene, plaintiff
1274 Adell Street
Prattville, Alabama 36066

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

Court of Criminal Appeals no. 90-1464
(Montgomery Circuit Court No. 90-5109)
Charles J. Greene vs. City of Montgomery
Appellant Appellee

Dear Sir or Madam:

You are hereby notified that on August 21, 1992, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama.

Application for rehearing overruled. Rule 39(k) motion denied.

LANE MANN
CLERK
COURT OF CRIMINAL APPEALS

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHARLES J. GREENE,
Plaintiff,
v. CIVIL ACTION NO. 92-A-1026-N
JOSEPH D. PHELPS, etc.,
et at.,
Defendants.

ORDER

In accordance with the memorandum opinion entered this day, Plaintiff's Motion to Alter and Amend Judgment is hereby GRANTED. It is the ORDER, JUDGMENT AND DECREE of this court that this action be dismissed with prejudice, costs taxed against the Plaintiff.

DONE, this the 11th day of March, 1993.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CHARLES J. GREENE,
Plaintiff,
v. CIVIL ACTION NO. 92-A-1026-N
JOSEPH D. PHELPS, etc.,
et al.,
Defendants.

MEMORANDUM OPINION

This cause is before the court on the Motion to Alter and Amend Judgment filed Plaintiff, Charles J. Greene, ("Greene"), on November 13, 1992. For the reasons set out below, the motion is due to be granted, but the action is dismissed with prejudice.

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Greene filed this action on August 20, 1992 against Joseph D. Phelps, etc., et. al., ("Defendants") seeking to have his trial record correctly transferred to the Alabama Court of Criminal Appeals for consideration in his case on appeal. As well as seeking injunctive relief to have the transcript transferred, he seeks a declaratory judgment, restitution, and money damages.

The court's opinion, filed on November 3, 1992, based its decision to dismiss Greene's case on the Younger abstention doctrine. Younger v. Harris, 401 U.S. 37 (1971). The Younger abstention doctrine requires federal courts to abstain from interfering in ongoing state proceedings. Greene was currently seeking a writ of certiorari to the Court of Criminal Appeals and, therefore, had not exhausted all of his state court remedies. Accordingly, the court found the Younger doctrine to be dispostive of his case.

The Younger abstention doctrine barred the claims for declaratory and injunctive relief against the Defendants in their official capacity. Younger, 401 U.S. at 43; Samuels v. Mackell, 401 U.S. 66, 73 (1971); Redner v. Citrus County, Florida, 919 F. 2d 646 (11th Cir. 1990). It is unclear whether the Younger doctrine protects defendants sued in their official capacity for restitution, and the doctrine does not bar Plaintiff's claims against Defendant Judge Phelps in his personal capacity. Therefore, the court now addresses Greene's objections to the court's decision to abstain under the Younger abstention doctrine, the claims for restitution against the Defendants in their official capacity, and the claims against Defendant Judge Phelps in his personal capacity.

The basis of the Younger doctrine is that, in the interest of federalism, federal courts should not interfere with ongoing state actions "absent a showing of bad faith prosecution, harassment, or extraordinary circumstances of irreparable harm." Cate v. Oldham, 707 F 2d 1176 (11th Cir. 1983). Greene argues that the court's decision to abstain from deciding the equitable claims was erroneous because his claim falls within the "bad faith" exception. He also argues that the state decisional law precludes him from presenting his federal claims in the state criminal action.

Although Greene has alleged that the actions of the Defendants, particularly Defendant Judge Phelps and the defendant court reporters, were taken in bad faith and with the purpose and intent of depriving Plaintiff of an opportunity to

present the omitted matters from his transcript on appeal, mere conclusory allegations of bad faith are insufficient to except a claim from the Younger abstention doctrine and bring this federal court into what is essentially a state court dispute. Moreover, Greene has not shown, even if the allegations of bad faith were true, that he has met the burden of irreparable harm and immediate injury necessary to obtain an injunction.

Greene argues that the decisional law of the states precludes him from bringing this claim in the state action. The relief that Plaintiff seeks to obtain through an injunction, a corrected record on appeal, is available through the state court system. The name of the relief may be entitled differently because of the differing nature and posture of the actions, but the desired result of obtaining a corrected record, whether by a Rule 20 motion, injunction, or declaratory judgment, is the same. It is true that his action for damages would not be available in the state criminal action. That relief would never, however, be available to him because of Judge Phelps' judicial immunity, as discussed below.

The Eleventh Amendment provides immunity for individuals sued in their official capacity. U.S. Const. Amend. XI. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). This immunity is not absolute, and does not extend to actions for prospective injunctive relief. Kentucky v. Graham, 473 U.S. 159 (1985). Judges sued in their official capacities are entitled to Eleventh Amendment immunity because they are state officials. See Pennhurst 465 U.S. 89; See also Johnson v. Kegans, 870 F. 2d 992 (5th Cir. 1989) (judge entitled to Eleventh Amendment immunity for suit in his official capacity). Court reporters are also state officials entitled to Eleventh Amendment immunity. See Foret v. Sullivan, 935 F. 2d , 2 n.2 (1st Cir. 1991) (court reporter would have been entitled to Eleventh Amendment immunity for damages in her official capacity). Therefore, the claims for restitution against the defendant judges in their official capacities and the defendant court reporters in their official capacities are due to be dismissed. See Edelman v. Jordan, 415 U.S. 651 (1974).

Judges sued in their individual capacities are entitled to "absolute immunity" for actions taken in their judicial capacity. Forrester v. White, 484 U.S. 219, 227 (1988). In determining what actions are judicial in nature, administrative, legislative, or executive functions performed by a judge have not been

regarded as judicial acts. Id. at 227-9; See Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) (judicial immunity does not extend to the promulgation of a code of conduct for attorneys because it is an act of rulemaking and not adjudication).

Plaintiff urges the court to find that Defendant Judge Phelps acted outside his judicial immunity. He argues that application of the Stump-Bradley test to Judge Phelps' actions establishes that he is not entitled to judicial immunity because he acted in the "clear absence of jurisdiction." The immunity analysis under either Stump-Bradley or Forrester is essentially identical. Thus, whether the court applies the Stump-Bradley test as Defendant suggests, or the Forrester test, the result is the same: Judge Phelps is entitled to judicial immunity for the claim against him in his individual capacity.

Under the Stump-Bradley test, the court should examine whether the act "is a function normally performed by a judge" and whether the parties "dealt with the judge in his judicial capacity" to determine whether an act by a judge was a judicial one. Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U. S. 335 (1872). In this case, the preparation and certification of the record for appeal is a function normally performed by the judge, and Greene was dealing with the judge in his judicial capacity when he asked for a record correction hearing and certification for appeal.

Under the Forrester test, the preparation of the record for appeal is an integral part of the appeal process, and not merely an administrative type function performed by the judge. The court, therefore, finds that it is an act performed in a judicial capacity. See Scruggs v. Moellering, 870 F. 2d 376 (7th Cir. 1989) (judge entitled to absolute immunity from damages for preparation of record for appeal). Accordingly, Judge Phelps is entitled to immunity from Plaintiff's claim for damages against him in his personal capacity. The claim against Judge Phelps in his personal capacity is due to be dismissed.

Conclusion

The Motion to Alter and Amend Judgment is due to be GRANTED.

The claims against the Defendants in their official capacity for declaratory and injunctive relief are dismissed pursuant to the Younger abstention doctrine as discussed in the court's memorandum opinion filed November 3, 1992.

The claims for restitution against the Defendants in their official capacity is hereby dismissed because he is entitled to absolute immunity for actions taken in his judicial capacity.

A separate order will be entered in accordance with this memorandum opinion.

DONE, this the 11th day of March, 1993.

/s/
UNITED STATES DISTRICT JUDGE

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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA
CITY OF MONTGOMERY,
Plaintiff
v. Case No. CC-90-5109
CHARLES J. GREENE,
Defendant

MOTION FOR RECUSAL

COMES NOW the Defendant, Charles J. Greene, and moves this Court for recusal and disqualification of Judge Joseph D. Phelps from presiding over, or considering, the matters set for hearing in this Court on January 20, 1993, at 8:00 A.M. in the above-styled cause. As grounds for this motion, the defendant respectfully shows unto this Court the following:

1. There is currently pending in the United States District Court for the Middle District of Alabama, Northern Division, an action for damages in which Joseph D. Phelps, in his individual and personal capacity, is a party adversary to this defendant, Charles J. Greene, and which action involves questions identical to those questions now pending before this court regarding the truthfulness of the Record on Appeal herein.

2. Joseph D. Phelps has a direct interest in the outcome of the scheduled hearing to determine the truthfulness of the present Record on Appeal filed herein this case, in that the aforementioned federal action will necessarily be greatly affected by such determination.

3. The natural result, of Joseph D. Phelps involvement in the aforementioned federal action, is bias against this Defendant, and is at common law a disqualification.

4. Proceeding to the scheduled hearing with Joseph D.

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Phelps presiding as Judge would be in violation of this Defendant's due process right to a fair and impartial tribunal and, also, in violation of the defendant's right to a Record on Appeal settled in accordance with procedures satisfying the policy expressed in the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Attached to this motion, and incorporated herein by reference, is the Affidavit of Charles J. Greene.

WHEREFORE, the premises considered, the Defendant requests that this Court enter its Order recusing and disqualifying Joseph D. Phelps from presiding, as Judge, over the hearing now set for January 20, 1993, in this case.

I hereby certify that I have this day, January 15, 1993, served a copy of the foregoing motion upon the attorney for the City of Montgomery, by placing said copy of motion in the United States mail, postage prepaid, and properly addressed.

/s/_____
Charles J. Greene, defendant

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA
CITY OF MONTGOMERY,
Plaintiff
v. Case No. CC-90-5109
CHARLES J. GREENE,
Defendant

AFFIDAVIT IN SUPPORT OF MOTION FOR RECUSAL

State of Alabama
County of Montgomery

The affiant, Charles J. Greene, deposes and says:

1. I am Charles J. Greene, the defendant in the above-styled case, and I make this affidavit in support of my Motion for Recusal.

2. I am the plaintiff in an action now pending in the United States District Court for the Middle District of Alabama in which action Joseph D. Phelps, in his individual capacity, is an opposing party.

3. The above-mentioned federal action seeks monetary damages from Joseph D. Phelps, and the matters now set for hearing in this above-styled case present questions which are

identical to questions presented in the federal action.

By my signature I affirm that, to the best of my knowledge and belief, all of the foregoing is true.

/s/_____
Dated

/s/_____
Charles J. Greene, defendant
1274 Adell Street
Prattville, Alabama 36066